

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 76-1059

In The  
**United States Court of Appeals**  
For The Second Circuit

RS

THE UNITED STATES OF AMERICA,

*Appellee.*

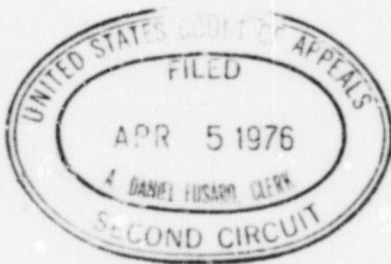
vs.

FRANK CERELL,

*Appellant.*

*On Appeal From the United States District Court For the  
Southern District of New York.*

**APPENDIX IN BEHALF OF APPELLANT  
FRANK CERELL**



FRANK A. LOPEZ  
*Attorney for Appellant  
Frank Cerell*  
31 Smith Street  
Brooklyn, New York 11201  
(212) 237-9500

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## DOCKET ENTRIES

1a

C. Form No. 100

CRIMINAL DOCKET

JUDGE OWEN

74 CR 1003

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
PS.	John W. Timbers, AUSA.
1. LEON ROGERS-1&2	791-1984
2. SAMUEL EASON, a/k/a 'Buster' - 1&2	
3. FRANK CERELL-1&3	
4. PAUL VIRUET-1&3	
	For Defendant:
	(2) Martin J. Siegel
	250 W 57th St, NYC 10019
	tele: 586-1410

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
(01)					
Fine,					
Clerk,					
Marshal,					
Attorney,					
Commissioner's Court,					
Witnesses,					
18:371 Consp. to steal from interstate shipment. (Ct. 1)					
18:659 Theft from interstate shipment. (Ct. 2&3)					
(Three Counts)					

DATE	PROCEEDINGS
6-25-74	Filed indictment. B/W ordered as to all defts. Weinfeld, J.
	B/W issued.
7-4-74	Deft. Rogers. (atty. present) Pleads not guilty. Motions returnable in 10 days. Bail fixed by Mag. continued. (\$25,000. P.R.B.)
	Assigned to Judge Wyatt as a related matter. Cannella, J.
11/12/74	Case re-assigned to Tyler, J. Cannella, J.
11-3-74	Pre-trial conference held. .... Wyatt, J.
11-6-74	Leon Rogers filed Warrant for Arrest of Deft. with marshal's return. Executed
	Warrant on 11-11-74.

-over-

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
1-25-74	LEON ROGERS-Filed the following papers received from Magistrate Raby. (Mag.#74-1354). Docket Entry Sheet Indictment Warrant, S.D.N.Y. Disposition Sheet Appearance Bond in the sum of \$25,000 unsecured P.R.B.		
12/74	F. Cerell, Jr. and P. Viruet- filed papers orig. filed with Magistrate Raby (1) docket entry sheet (2) indictment warrant (3) disposition sheet (4) appointment of counsel (5) notice of appearance (6) appearance bond		
7/75	Filed affdvt. of John Tibbert for writ of habeas corpus ad testificandum for Chester Crawford. Writ issued, returnable 1/10/75.		
1-21-75	Filed Govt.'s notice of readiness for trial.		
4-75	Filed Govt.'s affdvt. re: writ of habeas corpus ad pros. for Samuel Eason ret. 3/17/75.		
4-75	S. Eason- filed notice of appearance by atty. Martin J. Siegel.		
1-31-75	Mailed notice of reassignment.		
4-4-75	Pre-trial conference held. Not guilty pleas entered by defts. Eason, Cerell & Viruet. Trial date set May 19th.....Owen, J.		
1-18-75	SAM EASON-Filed CJA Form 21 Copy 5 appointing Larry Jones as investigator, dated 11-3-75.....Owen, J.		
1-18-75	SAM EASON-Filed CJA Form 21 Copy 2 approving payment to Larry Jones, dated 11-3-75. ....Owen, J.		
-09-76	SAMUEL EASON-Filed Writ of Habeas corpus with marshal's return. Deft. returned to Dannemora, Penitentiary, Dannemora, N.Y. on 12-30-75.		



1122

Page #3

DATE	PROCEEDINGS
01-09-76	SAMUEL EASON-Filed warrant for arrest with marshal's return. Returned unexecuted.
01-12-76	LEON ROGERS-Filed CJA Form 20 Copy 2 approving payment to Lawrence Levner, dated 1-6-76.....O on, I.
01-28-76	LEON ROGERS-Filed motion for reduction of sentence.
01-28-76	LEON ROGERS-Filed return on def's. motion for reduction of sentence. Motion denied.....O on, I. (mailed notice)

STATES DISTRICT COURT - CRIMINAL DOCKET

Case Filed: 10-10-75 Docket No.: 0929

Defendant: U.S. vs. CERELL, FRANK JR.

U.S. CODE SECTION: 18:371, 18:659

CHARGES: Consp. to commit theft. Theft fr. Interst. shipmt.

U.S. Attorney or Asst.: T. Gorman Bailly, AUSA (212) 791-1923

Defense: C.A. Ret. L. [blank] Self: [blank] None: [blank] Other: [blank]

CO: [blank]

ARREST: [blank] INDICTMENT: [blank] ARRAIGNMENT: [blank] TRIAL: [blank] SENTENCE: [blank]

U.S. COURT: [blank] Charge: [blank] Superceding: [blank] Indictment: [blank] 10-10-75

PRELIMINARY EXAMINATION OR REMOVAL HEARING: [blank] Date: [blank] Held: [blank] Intervening: [blank]

COMPLAINT: [blank] OFFENSE (In Complaint): [blank]

OUTCOME: [blank] BOND: [blank] AT: [blank]

Show last names and suffix numbers of other defendants on same indictment/information

Rogers-1, Eason-2, Viruet-4.

DATE	PROCEEDINGS	V. Excludable
10-10-75	Filed indictment.	
12-11-75	Filed Govt's. demand for notice of intention to offer alibi defense.	
12-10-75	Jury trial begun before Owen, J.	
12-11-75	Trial continued.	
12-12-75	Trial continued.	
12-15-75	Trial continued.	
12-16-75	Trial continued.	
12-17-75	Trial continued.	
12-18-75	Trial continued, & deliberations begun & concluded. Verdict - Guilty on both counts. Sentence 2-5-75 at 2:15 P.M. Pre-sentence investigation ordered. Bail continued.....Owen, J.	
02-06-76	Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ONE (1) YEAR AND ONE (1) DAY on EACH of Counts 1 and 3 to run CONCURRENTLY with each other. Bail is continued pending appeal.....Owen, J. Issued commitment 2-10-76.	
02-11-76	Filed Deft's. notice of appeal from the judgment of conviction entered on 2-6-76. (mailed copies to Frank Cerell, 1095 Lorraine Dr., Franklin Square, L.I., N.Y. and U.S. Attorney's Office).	

OPPOSITE THE APPLICABLE DOCKET ENTRIES IN SECTION IV SHOW, IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(b) - "SPEEDY TRIAL ACT"

BEST COPY AVAILABLE



INDICTMENT (DOCKET NO. 74 Cr. 1003)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
UNITED STATES OF AMERICA,

v.

LEON ROGERS, SAMUEL EASON, a/k/a "Buster",  
FRANK CERELL, JR. and PAUL VIRUET,

Defendants.  
-----x

COUNT ONE

The Grand Jury charges:

1. From on or about the 15th day of October 1971, and up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, LEON ROGERS, SAMUEL EASON, a/k/a "Buster," FRANK CERELL, JR. and PAUL VIRUET, the defendants, unlawfully, wilfully, and knowingly did combine, conspire, confederate and agree together, and with each other, and with persons to the Grand Jury known and unknown, to commit offenses against the United States, to wit, to violate Title 18, United States Code, Section 659.

2. It was a part of said conspiracy that LEON ROGERS and SAMUEL EASON, a/k/a "Buster," and certain of their co-conspirator would unlawfully, wilfully and knowingly steal and take and carry away from a motor truck, with intent to convert to their own use, goods which were moving as an interstate shipment of freight.

3. It was further a part of said conspiracy that LEON ROGERS and SAMUEL EASON, a/k/a "Buster," and certain of their co-conspirators would unlawfully, wilfully and knowingly take, carry, and deliver said goods to defendants FRANK CERELL, JR. and PAUL VIRUET.

4. It was further part of said conspiracy that defendants FRANK CERELL, JR. and PAUL VIRUET would unlawfully, wilfully and knowingly buy, receive, have in their possession, sell and dispose of the aforesaid goods, knowing said goods to have been stolen, as set forth above in paragraph 2 of this count of the indictment.

OVERT ACTS

In pursuance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York, and elsewhere:

1. In or about February 1973 LEON ROGERS, SAMUEL EASON, a/k/a "Buster," Chester Crawford, Carlton Boyd, and James Dixon met in the vicinity of 121st Street and Manhattan Avenue in Manhattan in New York City.

2. On or about the 21st day of February 1973 LEON ROGERS, with James Dixon as a passenger, double parked an automobile in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.

3. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd stood in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.



4. On or about the 21st day of February 1973 Chester Crawford parked in an automobile in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.

5. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd entered the automobile driven by Chester Crawford in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.

6. On or about the 21st day of February 1973 Chester Crawford drove an automobile, with SAMUEL EASON, a/k/a "Buster," and Carlton Boyd as passengers, behind a Modern Trucking Company motor truck from the vicinity of 24th Street and Tenth Avenue to the vicinity of 23rd Street and Ninth Avenue in Manhattan in New York City.

7. On or about the 21st day of February 1973 LEON ROGERS, with James Dixon as a passenger, drove behind the automobile driven by Chester Crawford from the vicinity of 24th Street and Tenth Avenue to the vicinity of 23rd Street and Ninth Avenue in Manhattan in New York City.

8. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd got out of the automobile driven by Chester Crawford and got into the cab of the Modern Trucking Company motor truck.

9. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd directed the driver of the Modern Trucking Company motor truck to drive several blocks.

10. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," Carlton Boyd, LEON ROGERS, and James Dixon

placed the truck driver in the back seat of the automobile driven by LEON ROGERS.

11. On or about the 21st day of February 1973 LEON ROGERS, with James Dixon as a passenger, drove around New York City with the truck driver in the back seat of the automobile.

12. On or about the 21st day of February 1973 Carlton Boyd drove the Modern Trucking Company motor truck, with SAMUEL EASON, a/k/a "Buster," as a passenger, from downtown Manhattan in New York City to Long Island.

13. On or about the 21st day of February 1973 Chester Crawford drove an automobile from downtown Manhattan in New York City to Long Island.

14. On or about the 21st day of February 1973 Chester Crawford had a telephone conversation with PAUL VIRUET.

15. On or about the 21st day of February 1973 Chester Crawford had a telephone conversation with FRANK CERELL, JR.

16. On or about the 21st day of February 1973 FRANK CERELL, JR. and PAUL VIRUET travelled in an automobile on Long Island.

17. On or about the 21st day of February 1973 PAUL VIRUET, SAMUEL EASON, a/k/a "Buster," Carlton Boyd, and Chester Crawford unloaded the Modern Trucking Company motor truck at FRANK CERELL, JR.'S home on Long Island.

(Title 18, United States Code, Section 371)



COUNT TWO

The Grand Jury further charges:

On or about the 21st day of February 1973, in the Southern District of New York, LEON ROGERS and SAMUEL EASON, a/k/a "Buster," defendants, unlawfully, wilfully and knowingly, and with intent to convert to their own use, did steal, take and carry away from a Modern Trucking Company motor truck goods of a value greater than \$100, to wit, 168 cartons of children's wear, which were moving as, which were a part of, and which constituted an interstate shipment of freight and express.

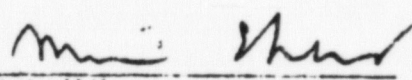
(Title 18, United States Code, Sections 659 and 2)

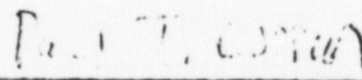
COUNT THREE

The Grand Jury further charges:

On or about the 21st day of February 1973, on Long Island, FRANK CERRILL, JR. and PAUL VIRULT, defendants, unlawfully, wilfully and knowingly did buy, receive and have in their possession goods of a value greater than \$100, to wit, 168 cartons of children's wear, which had been unlawfully stolen, taken and carried away from a motor truck in interstate commerce in the Southern District of New York, knowing the said goods to have been stolen, and unlawfully taken and carried away from a motor truck.

(Title 18, United States Code, Sections 659 and 2)

  
FOREMAN

  
PAUL J. CURRAN  
United States Attorney

74 CR 1003

FD-100 (Rev. 11-17-71) (24-1-25-73)

United States District Court

SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

LEON ROGERS, SAMUEL EASON,  
a/k/a "Guster", FRANK CERELL, JR.,  
and PAUL VIRUET,

Defendant.

INDICTMENT

74 Cr.

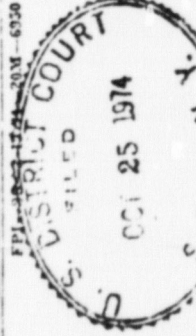
(Title 18, United States Code, Sections  
371, 659 and 2)

PAUL J. CERRA

United States Attorney

A TRUE BILL

Foreman.



JUDGE OWEN

Tyler, J.

BENCH WARRANTS ORDERED.

OCT 25 1974 All defendants to

Greenfield, J.

NOV 4 1974

Best Powers appears (Cathy  
L. Powers, Pres. of) and pleads N.Y.  
Law referred to W. H. J. as a related  
matter to days of motions. Best  
Powers Pleas entered by the Reporter  
at 2:45 PM, P.M.  
Canada, J.

10a

NOV 8 1974

Plaintiff's copy of the

report, J.

NOV 12 1974

Plaintiff's copy of the

report, J.

Canada, J.



11a

APR 1

1975 P.A.C. HOLD. N/C PLANS ENTERED BY DATA 273502V

d

CORREL; & VINCLT. TRIM DATE SET FOR MAY 1976.

OWNY J.

R

TGR:st  
74-3398  
n-957

SUPERSEDING INDICTMENT (DOCKET NO. 75 Cr. 979)

123

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v -

LEON ROGERS, SAMUEL EASON,  
a/k/a "Buster", FRANK CERELL, JR.,  
and PAUL VIRUET,

Defendants.

75 CRIM 979

INDICTMENT

S 75 Cr.

COUNT ONE

The Grand Jury charges:

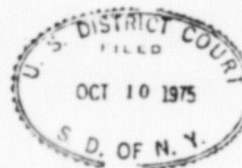
1. From on or about the 15th day of October 1972,

and up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, LEON ROGERS, SAMUEL EASON, a/k/a "Buster," FRANK CERELL, JR. and PAUL VIRUET, the defendants, unlawfully, wilfully, and knowingly did combine, conspire, confederate and agree together, and with each other, and with persons to the Grand Jury known and unknown, to commit offences against the United States, to wit, to violate Title 18, United States Code, Section 659.

2. It was a part of said conspiracy that LEON ROGERS and SAMUEL EASON, a/k/a "Buster," and certain of their co-conspirators would unlawfully, wilfully and knowingly steal and take and carry away from a motor truck, with intent to convert to their own use, goods of a value in excess of \$100 which were moving as an interstate shipment of freight.

3. It was further a part of said conspiracy that LEON ROGERS and SAMUEL EASON, a/k/a "Buster," and certain of their co-conspirators would unlawfully, wilfully and knowingly take, carry, and deliver said goods to defendants FRANK CERELL, JR. and PAUL VIRUET.

4. It was further part of said conspiracy that defendants FRANK CERELL, JR. and PAUL VIRUET would unlawfully, wilfully and knowingly buy, receive, have in their possession, sell and dispose of the aforesaid goods, knowing said goods to have been stolen, as set forth above in paragraph 2 of this count of the



MICROFILM  
SERIALS  
OCT 1975



In pursuance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York, and elsewhere:

1. In or about February 1973 LEON ROGERS, SAMUEL EASON, a/k/a "Buster," Chester Crawford, Carlton Boyd, and James Dixon met in the vicinity of 121st Street and Manhattan Avenue in Manhattan in New York City.
2. On or about the 21st day of February 1973 LEON ROGERS, with James Dixon as a passenger, double parked an automobile in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.
3. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd stood in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.
4. On or about the 21st day of February 1973 Chester Crawford parked in an automobile in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.
5. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd entered the automobile driven by Chester Crawford in the vicinity of 24th Street and Tenth Avenue in Manhattan in New York City.
6. On or about the 21st day of February 1973 Chester Crawford drove an automobile, with SAMUEL EASON, a/k/a "Buster," and Carlton Boyd as passengers, behind a Modern Trucking Company motor truck from the vicinity of 24th Street and Tenth Avenue to the vicinity of 23rd Street and Ninth Avenue in Manhattan in New York City.
7. On or about the 21st day of February 1973 LEON ROGERS, with James Dixon as a passenger, drove behind the automobile driven by Chester Crawford from the vicinity of 24th Street and Tenth Avenue to the vicinity of 23rd Street and Ninth Avenue in Manhattan in New York City.
8. On or about the 21st day of February 1973 SAMUEL EASON, a/k/a "Buster," and Carlton Boyd got out of the automobile driven by Chester Crawford and got into the cab of the Modern Trucking Company motor truck.

9. On or about the 21st day of February 1973  
SAMUEL EASON, a/k/a "Buster", and Carlton Boyd directed the  
driver of the Modern Trucking Company motor truck to the  
several blocks.

10. On or about the 21st day of February 1973  
SAMUEL EASON, a/k/a "Buster", Carlton Boyd, LEON ROGERS, and  
James Dixon placed the truck driver in the back seat of the  
automobile driven by LEON ROGERS.

11. On or about the 21st day of February 1973  
LEON ROGERS, with James Dixon as a passenger, drove around  
New York City with the truck driver in the back seat of the  
automobile.

12. On or about the 21st day of February 1973  
Carlton Boyd drove the Modern Trucking Company motor truck,  
with SAMUEL EASON, a/k/a "Buster", as a passenger, from  
downtown Manhattan in New York City to Long Island.

13. On or about the 21st day of February 1973  
Chester Crawford drove an automobile from downtown Manhattan  
in New York City to Long Island.

14. On or about the 21st day of February 1973  
Chester Crawford had a telephone conversation with PAUL VIRUET.

15. On or about the 21st day of February 1973  
Chester Crawford had a telephone conversation with FRANK CERELL,  
JR.

16. On or about the 21st day of February 1973  
FRANK CERELL, JR. and PAUL VIRUET travelled in an automobile  
on Long Island.

17. On or about the 21st day of February 1973  
PAUL VIRUET, SAMUEL EASON, a/k/a "Buster", Carlton Boyd,  
and Chester Crawford unloaded the Modern Trucking Company  
motor truck at FRANK CERELL, JR.'s home on Long Island.

(Title 18, United States Code, Section 371)



The Grand Jury further charges:

On or about the 21st day of February 1973, in the Southern District of New York, LEON ROGERS and SAMUEL EASON, a/k/a "Buster", defendants, unlawfully, wilfully and knowingly, and with intent to convert to their own use, did steal, take and carry away from a Modern Trucking Company motor truck goods of a value greater than \$100, to wit, 168 cartons of children's wear, which were moving as, which were a part of, and which constituted an interstate shipment of freight and express.

(Title 18, United States Code, Sections 659 and 2)

COUNT THREE

The Grand Jury further charges:

On or about the 21st day of February 1973, on Long Island in the Eastern District of New York, FRANK CERELL, JR. and PAUL VIRUET, defendants, unlawfully, wilfully and knowingly did buy, receive and have in their possession goods of a value greater than \$100, to wit, 168 cartons of children's wear, which had been unlawfully stolen, taken and carried away from a motor truck in interstate commerce, knowing the said goods to have been stolen and unlawfully taken and carried away from a motor truck.

(Title 18, United States Code, Sections 659 and 2)

A TRUE COPY  
RAYMOND F. BURCHARDT, Clerk

By M. Gail  
Deputy Clerk

DEP.

Patrick Boland  
FOREMAN

Paul A. Curran  
PAUL J. CURRAN  
United States Attorney

United States District Court  
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA

vs.

LEON ROGERS, SAMUEL EASON,  
a/k/a "Buster", FRANK CERRELL, JR.,  
and PAUL VIRUET,

Defendants.

INDICTMENT

S 75

(18 U.S.C. §§ 371, 659 and  
2.)

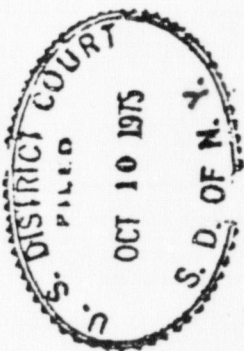
PAUL J. CURRAN

United States Attorney

A TRUE BILL

*Patrick Boland*  
Dep  
Foreman.

FBI-88-2-19-71-2001-9950



OCT 20 1975 - DEPT. EASON PRESENT W/ATTY. (MARTIN SIEGEL)  
DEPT. PLACES GUILTY TO CT. 1 ONLY. CT. 2 REMAINS OPEN  
P.S.I. ORDERED. SENTENCE FOR DEC. 5<sup>TH</sup> @ 2:15 P.M. RM. 1105  
AWAY.

12-1-75 - SENTENCE FOR DEPT. EASON MIT. HQ DEC. 1975 @ 2:15 P.M.  
AWAY.

DEC 10 1975 - COURT'S MOTION TO SEARCH LEON ROGERS FROM  
THIS INDICT. IS GRANTED.  
AWAY.

DEC 10 1975 - TRIDE EASON AS TO DEPTS. CERRELL & VIRUET  
AWAY.

DEC 11 1975 - DEPT. ROGERS PRESENT ON WIRE (W/ATTY. LARSEN)  
PLACES GUILTY TO CT. 2. CT. 1 REMAINS OPEN UNTIL START OF NEXT  
SENTENCE FOR DEC. 19<sup>TH</sup> @ 2:15 P.M.  
AWAY.

DEC 12 1975 - TRIDE EASON W.

DEC 13 1975 - TRIDE CONT'D.

DEC 16 1975 - TRIDE CONT'D.

DEC 17 1975 - TRIDE CONT'D.

DEC 18 1975 - TRIDE CONT'D. & PRESENTATIONS BEING MADE  
AWAY. GUILTY - BOTH DEPTS. (CERRELL & VIRUET) AS TO  
SENTENCE FOR DEC. 21<sup>ST</sup> @ 2:15 P.M. RM. 1105



1-1 - JEFF ROBERTS Prison (w/PTTY LEAD) FOR SOUTHERN. CT 2 - 1 1/2 YRS TO COMMENCE UPON EXPIRATION OF FED TERM NOW SERVING. CT. 1 IS DISM.

DET. WATSON - Prison (w/PTTY - SILENT) FOR SOUTHERN. CT 1 - 1 1/2 YRS TO COMMENCE UPON EXPIRATION OF STATE SENTENCE NOW SERVING. CT. 2 IS DISM.

OWEN, J.

R

6-76 - DET. WATSON Prison (w/PTTY FUSFIELD) FOR SOUTHERN. SENTENCE IS 1 1/2 YRS ON EACH OF CTS 1 + 3 TO RUN CONCURRENTLY. BAIL CONT'D. PENDING APPEAL.

OWEN, J.

DET. WATSON - 1 1/2 YRS (w/PTTY WTB) FOR SOUTHERN. SENTENCE IS 1 1/2 YRS ON EACH OF CTS 1 + 3 TO RUN CONCURRENTLY. DET. IS TO SERVE FIRST TERM ONLY. EXEC. OF ROMANOW IS SUSPENDED + DET. PLACED ON PROB FOR TERM PERIOD. BAIL CONT'D. PENDING APPEAL.

OWEN, J.

## NOTICE OF APPEAL (Filed February 13, 1976)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

Docket No. 75 Cr. 979

-against-

NOTICE OF APPEAL

FRANK CERELL,

Defendant-Appellant.

-----x

S I R S :

PLEASE TAKE NOTICE, that the defendant-appellant FRANK CERELL hereby appeals to the United States Court of Appeals for the Second Circuit, from the Judgment of Conviction rendered against him on February 6th, 1976, and imposed by the HONORABLE RICHARD OWEN, District Judge, and sentencing the defendant-appellant herein to a term of One (1) year and one (1) day of the First and Third Counts, concurrent, and from each and every part of said Judgment.

DATED: Brooklyn, New York, February 9th, 1976.

Yours, etc.,

FRANK A. LOPEZ  
Attorney for Defendant-Appellant  
FRANK CERELL  
31 Smith Street  
Brooklyn, New York 11201  
Tel. (212) 237-9500

TO:  
HON. THOMAS J. CAHILL  
United States Attorney  
Southern District of New York  
One St. Andrews Plaza  
New York, N. Y. 10007

CLERK (Above-Captioned Court)



TGR:jp  
M-966

REQUEST NO. 30

Similar Acts - Intent [If Applicable]

You may consider, in determining whether a defendant acted with guilty knowledge or intent, the fact, if you find it true, that the defendant engaged in other transactions similar to those charged in the indictment.

Kaplan v. United States, 18 F.2d  
939, 943 (C.A. 2d 1927);

United States v. Shurtloff, 43 F.2d  
944, 947 (C.A. 2d 1930);

United States v. Leitner, 312 F.2d  
107, 108 (2d Cir. 1963);

United States v. Deaton, 381 F.2d  
114 (2d Cir. 1967);

United States v. Masochi, Docket  
No. 3284 (April 7, 1970).

GOVERNMENT'S DEMAND FOR NOTICE OF INTENTION TO  
OFFER ALIBI DEFENSE  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

20a

-----X

UNITED STATES OF AMERICA	:	DEMAND FOR NOTICE
	:	OF INTENTION TO
-v-	:	<u>OFFER ALIBI DEFENSE</u>
LEON ROGERS et al.,	:	S75 Cr. 979 (RO)
Defendant.	:	

-----X

S I R S :

The Government by its attorney pursuant to Fed.R. Cr.P., 12.1(a) hereby demands that the defendant Paul Viruet and Frank Cerell, Jr. state whether it is their intention to offer a defense of alibi. The offense alleged in Count Three of the Indictment initially took place on February 21, 1973 approximately between 7:00 A.M. and 8:15 A.M. at 33 Belmont Avenue, Plainview, New York.

If a defense of alibi is to be made defendant(s) shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he (they) intends to rely to establish such alibi.

Dated: New York, New York

December 10, 1975

THOMAS J. CAHILL  
United States Attorney for the  
Southern District of New York  
Attorney for the United States  
of America.

By:   
T. GORMAN REILLY  
Assistant United States Attorney

TO:

IRVING B. COHEN, ESQ.  
Attorney for Defendant Cerell  
170 Broadway  
New York, New York 10038



TGR:im

Government's Demand for Notice of Intention to  
Offer Alibi Defense

21a

A. ISADORE EIBEL, ESQ.  
Attorney for Defendant Viruet  
170 Broadway  
New York, New York 10038

EXCERPTS OF TRANSCRIPT OF PROCEEDINGS  
(COURT'S CHARGE)

22a

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\* \* \*

2 charge and I am going to give it to the extent you find  
3 I give it. It's a fairly standard charge, as I am sure  
4 you are aware.

5 All right. Let's get the jury.

6 MR. REILLY: The record reflects that there  
7 has been no objection made by counsel for the defense.

8 (Jury present.)

9 THE COURT: Good morning, ladies and gentlemen.

10 Mr. Foreman, ladies and gentlemen of the jury,  
11 we are at the point in this trial where you are soon to  
12 undertake your final function as jurors; and it is here,  
13 as I said to you at the outset of this case, that you  
14 are to perform what I regard as one of the most valuable  
15 duties and obligations of citizenship in this country,  
16 which is to act as ministers of justice and to determine,  
17 in accordance with the instructions that I will give  
18 you, and in accordance with the evidence that you have  
19 heard, what are the facts in this case, what happened.

20 You are to do this and discharge your duties  
21 with complete fairness, complete impartiality; and as I  
22 said when you were selected, you are to do it without  
23 any bias or prejudice for or against the government or  
24 for or against Mr. Cerell or Mr. Virnet, either of the  
25 defendants, as parties to this case.



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2 This is an important case, obviously to both  
3 sides as well as to the public at large. The fact that  
4 the government is a party here entitles it to no greater  
5 consideration than that given any other party, and in  
6 any other case. By the same token, it is entitled to  
7 no less consideration. All parties, whether it is the  
8 government, an individual, a corporation or whatever,  
9 all stand alike and as equals before the bar of justice.

10 In passing, on the fact issues here, which is  
11 your role, you are the sole and exclusive judges of those  
12 facts. This is not my province. This is your province.  
13 You determine the weight of the evidence; you appraise  
14 the credibility or believability of the witnesses you  
15 have heard; you draw such reasonable inferences from  
16 the evidence as you think are warranted; you resolve such  
17 conflicts as you may find exist in the evidence. In  
18 doing this, I will later give you some thoughts as to  
19 how you can be assisted in determining these issues and  
20 determining the questions of credibility or believability  
21 that you may find.

22 My final function as the judge, is to instruct  
23 you as to the law; and it is your duty, I charge you that  
24 it is your duty to accept these instructions of mine  
25 and apply them to the facts as you may find them.

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2 With respect to any fact matter, it is your  
3 recollection and yours alone that governs as to what the  
4 testimony was. I think I may have told you sometime  
5 early in the case or otherwise, that anything that any  
6 attorney has said in this case with respect to any  
7 testimony, whether during trial, in a question, in an  
8 argument, in summation, or anywhere else, is not to be  
9 substituted for your own recollection of the evidence.

10 So too, anything that I may have said or may  
11 have referred to during the course of the trial or even  
12 during the course of this charge, with regard to any  
13 matter in evidence, is not to be taken in place of your  
14 own recollection as to what the testimony was. If you  
15 wish to consider any exhibit, you have only to ask for it  
16 and it will be made available for your consideration.

17 Before we get to the precise charges here,  
18 let me turn to a few preliminary things:

19 Let me say that the fact that there are, in  
20 Count 1, there are two persons named, Leon Rogers and  
21 Samuel Eason, as defendants, who were not on trial before  
22 you, that fact is not to enter into your consideration  
23 or to be the subject of any conjecture by you or play  
24 any part whatsoever in your deliberations.

25 The indictment in this case contains two



1 mblm 300

2 counts, and two of the defendants are on trial before  
3 you: Mr. Cerell and Mr. Viruet. You are to pay attention  
4 only to the evidence concerning those two gentlemen. In the  
5 determination of their innocence or guilt, you must  
6 bear in mind that guilt is a personal thing. The guilt  
7 or innocence of the defendant on trial before you must  
8 be determined separately with respect to him, solely on  
9 the evidence presented against him, or the lack of  
10 evidence as the case may be.

11 The case of each defendant stands or falls on  
12 the proof or lack of proof of the charges against him  
13 and not against anybody else. Therefore, the fact that  
14 Samuel Eason, nicknamed "Buster,"-- as we heard him, one  
15 of the defendants named in the first count of this  
16 indictment--pleaded guilty, is not evidence of the guilt  
17 of any other defendant. Nor is it evidence that the  
18 crimes charged were committed. It may not be considered,  
19 in any event. Nor may any adverse inference be drawn  
20 against any defendant on trial by reason of the fact  
21 that Mr. Eason took a plea.

22 As I said, the guilt or innocence of the  
23 defendants on trial must be determined by you solely  
24 upon the evidence introduced against them or the lack of  
25 it, and not on any evidence introduced against anybody

1 mblm 301

2 else.

3           There are certain principles of law which  
4 apply in every criminal case. I may have made reference  
5 to some of them when you were selected as jurors, and  
6 I am going to repeat them now. This indictment is a  
7 number of pieces of paper. It is merely a charge. It  
8 is no evidence of anything. It is not proof of the  
9 defendant's guilt, and no weight whatsoever is to be  
10 given to the fact that an indictment has been returned  
11 here. Each defendant has pleaded "Not guilty" to the  
12 charges that are typed upon these pieces of paper. Thus,  
13 the government at all times throughout the course of this  
14 trial has the burden of proving the charges against each  
15 defendant beyond a reasonable doubt.

16           A defendant does not have to prove his  
17 innocence. A defendant does not have to prove anything.  
18 On the contrary, a defendant is presumed to be innocent  
19 of the charges contained in this indictment. This  
20 presumption of innocence was in his favor at the start  
21 of the trial. It continued in his favor through the  
22 testimony taking. It is in his favor even as I am  
23 instructing you at this moment, and remains in his favor  
24 during the course of your deliberations in the jury room.

25           The presumption of innocence is removed only



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2 if and only when you are satisfied that the government  
3 has sustained its burden of proving the guilt of a  
4 defendant beyond a reasonable doubt. At that point, the  
5 presumption of innocence would fall away.

6 The question that comes up is: What is a  
7 reasonable doubt? The words, as you can see, practically  
8 define themselves. It is a doubt founded upon reason,  
9 and arising out of the evidence in the case, or the lack  
10 of evidence, as the case may be. It is a doubt which a  
11 reasonable person has, after carefully weighing all the  
12 evidence. Reasonable doubt is a doubt which appeals  
13 to your reason, your judgment, your common sense, and  
14 your experience. It is not caprice, whim, speculation,  
15 guesswork, conjecture, or suspicion. Reasonable doubt  
16 is not an excuse to avoid the performance of an unpleasant  
17 duty. It is not sympathy for a defendant.

18 If, after a fair and impartial consideration  
19 of all the evidence, you can candidly and honestly say  
20 that you are not satisfied with the guilt of a defendant;  
21 that you do not have an abiding conviction of his guilt;  
22 then in sum, if you have such a doubt as would cause you  
23 as a prudent person to hesitate before acting in matters  
24 of importance to yourself, then you have a reasonable  
25 doubt. In that circumstance, it is your duty to acquit.

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1  
2 If on the other hand, after such impartial and  
3 fair consideration of all the evidence, you can candidly  
4 and honestly say that you do have an abiding conviction  
5 of a defendant's guilt, such a conviction as you would  
6 be willing to act upon in importance and weighty matters  
7 in the personal affairs of your own life, then you have  
8 no reasonable doubt, and under such circumstances, it  
9 is your duty to convict.

10 One final word on this subject:

11 Reasonable doubt does not mean "a positive  
12 certain," or "beyond all possible doubt." If that  
13 were the rule, few persons, however guilty, would ever  
14 be convicted. It is practically impossible for a person  
15 to be absolutely and completely convinced of any  
16 controverted fact which by its nature cannot be proved  
17 by mathematical certainty. Therefore, the law in a  
18 criminal case is that it is sufficient that the guilt  
19 of a defendant be established beyond a reasonable doubt,  
20 not beyond all possible doubt.

21 As I have said, the indictment in this case  
22 against Mr. Cerrell and Mr. Viruet contains two counts.  
23 Each count charges a separate crime. I am going to read  
24 the indictment to you:

25 Count 1: "From on or about the 15th day of



1 mblm 304

2 October, 1972, up to and including the date of the filing  
3 of this indictment," -- and you may have a copy of the  
4 indictment in the jury room -- "in the Southern District  
5 of New York and elsewhere," -- and I charge you that the  
6 Southern District of New York includes the counties of  
7 Manhattan and The Bronx and a number of counties up  
8 toward Albany, which are not relevant to any proof that  
9 we've heard -- "from on or about the 15th day of October,  
10 1972 up to and including the date of the filing of this  
11 indictment," -- and it was filed on the 10th of October,  
12 1975 -- "in the Southern District of New York and else-  
13 where; Leon Rogers, Samuel Eason, Frank Cerell, Jr., and  
14 Paul Viruet, the defendants, unlawfully, wilfully, and  
15 knowingly did combine, conspire, confederate and agree  
16 together and with each other, and with persons to the  
17 grand jury known and unknown, to commit offenses against  
18 the United States, to wit, to violate Title 18, United  
19 States Code, Section 659." -- I will give you the details  
20 on these later.

21 "It was part of said conspiracy that Leon  
22 Rogers; and Samuel Eason, also known as "Buster," and  
23 certain of there co-conspirators, would unlawfully, wil-  
24 fully, and knowingly steal and take and carry away from  
25 a motor truck, with intent to convert to their own use,

1 mblm 305

2 goods of a value in excess of \$100, which were moving as  
3 an interstate shipment of freight.

4 "It was further a part of said conspiracy  
5 that Leon Rogers and Samuel Eason and certain of their  
6 co-conspirators would unlawfully, wilfully and knowingly  
7 carry and deliver said goods to defendants Frank Cerell,  
8 Jr. and Paul Viruet.

9 "Four: It was further part of said conspiracy  
10 that defendants Frank Cerell, Jr. and Paul Viruet would  
11 unlawfully, wilfully, and knowingly buy, receive, have  
12 in their possession, sell, and dispose of the aforesaid  
13 goods, knowing said goods to have been stolen, as set  
14 forth in Paragraph 2 of this count of the indictment."

15 There are listed some overt acts which I will  
16 speak to you about later.

17 Count 2 charges: "On or about the 21st day  
18 of February, 1973, on Long Island, in the Eastern  
19 District of New York,"-- and Long Island, Brooklyn and  
20 Queens are in the Eastern District for your information --  
21 "Frank Cerell, Jr. and Paul Viruet, defendants, unlaw-  
22 fully, wilfully, and knowingly did buy, receive, and  
23 have in their possession goods of a value greater than  
24 \$100, to wit, 168 cartons of children's wear, which had  
25 been unlawfully stolen, taken, and carried away from a



1 mblm 306

2 motor truck in interstate commerce, knowing the said  
3 goods to have been stolen and unlawfully taken and  
4 carried away from the motor truck."

5 Now, the first count charges a conspiracy.  
6 It charges that all the defendants named in the indict-  
7 ment, together with other to the grand jury known and  
8 unknown, conspired to violate a federal law; that is,  
9 they agreed to steal a truck and its contents, which was  
10 moving in interstate commerce, and thereafter, to  
11 deliver the stolen contents to Defendants Cerell and  
12 Viruet to dispose of. I shall refer to this count as  
13 the "conspiracy count."

14 The second count of the indictment, I shall  
15 refer to as the "substantive count." In that count,  
16 Mr. Cerell and Mr. Viruet are charged with possession  
17 of goods stolen from an interstate shipment, knowing that  
18 they had been stolen. A conspiracy to commit a crime  
19 is an entirely separate and distinct offense from the  
20 substantive crime which is the objective of the con-  
21 spiracy. A conspiracy, sometimes referred to as a  
22 "partnership in crime" because it involves collective  
23 or organized action presents a greater potential threat  
24 to the public interest than the illicit activity of a  
25 single individual.

mbhm 307

It was for these and other reasons that Congress made conspiracy an entirely separate, distinct, and different violation from the law or laws which might be the objective of the conspiracy.

The essence of a criminal conspiracy is an agreement or understanding to violate another law or laws. Thus, if a conspiracy exists, even if it should fail in its purpose, it is still punishable as a crime. Consequently, in a conspiracy charge, there is no need for the government to prove an actual violation of federal law, although here, obviously, the government contends that it has proved an actual violation as well; that is, the government contends that it has not only proved the agreement to highjack an interstate shipment and fence its contents, but also that it has proved the actual receipt by the fences of the stolen merchandise itself.

Since the essential elements for conviction on a substantive count, that is Count 2 of this indictment, are somewhat different from the essential elements of the crime of conspiracy, let us consider each count separately -- and I believe it will be somewhat clearer for you if we first discuss the substantive count, that is, Count 2.



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Count 2 alleges a violation of Section 659 of Title 18 of the United States Code, which provides in pertinent part as follows:

"Whoever buys or receives or has in his possession any such goods or chattels," -- and this has to do with chattels unlawfully stolen or taken away from a motor truck or other vehicle moving in interstate commerce having the value of more than a hundred dollars-- "whoever buys or receives or has in his any such possession, any such goods or chattels, knowing the same to have been embezzled or stolen is guilty of a crime."

Count 2 of the indictment charges Cerell and Viruet with the illegal possession of such stolen goods. In order to find either Defendant Cerell or Viruet guilty of the crime charged in Count 2, you must find each of the following elements beyond a reasonable doubt:

First, that the cartons of merchandise were, in fact, stolen from a Modern Trucking Co. vehicle in Manhattan.

Second, that at the time of the theft, the cartons were part of an interstate shipment; that is, that they were on their way from New York to New Jersey.

Third, that the defendant you are considering

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2 had the cartons of goods in his possession.

3 Fourth, that the said defendant knew the  
4 cartons to have been stolen.

5 Fifth, that the cartons had a value in excess  
6 of a hundred dollars.

7 Let me read those to you again:

8 "First, the cartons of merchandise were, in fact,  
9 stolen from a Modern Trucking Co. vehicle in Manhattan.

10 "Second, that at the time of the theft, the  
11 cartons were part of an interstate shipment; that is,  
12 were on their way from New York to New Jersey.

13 "Third, that the defendant you are considering,  
14 had the cartons of goods in his possession.

15 "Fourth, that the said defendant knew the cartons  
16 to have been stolen.

17 "Fifth, that the cartons had a value in excess  
18 of a hundred dollars."

19 Now, let us define some of these terms. I am  
20 sure we all have a pretty good layman's idea of what the  
21 word "steal" means, but we must be precise in this case.,

22 To steal means: "To obtain goods belonging  
23 to another, with intent to deprive the owner of the  
24 rights and benefits of ownership."

25 As to the theft being of an interstate shipment,



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88.3

I charge you that goods intended by a shipper to be shipped to another state, become part of interstate commerce as soon as they have finally left the shipper's possession; and are in interstate commerce while in the possession of a carrier or a trucking company which is to forward them on such journey.

This means that the government, to prevail on the substantive count, must prove that the cartons in question were, in fact, being sent by a shipper in New York with the intention that they be transported across a state line to a distribution point or warehouse in New Jersey. The government is not required to prove that a defendant knew the goods to have been stolen from such an interstate shipment. On the substantive count, and this is a distinction that you must pay careful attention to, on this count, the substantive count, the government must only show that the goods were intended to be shipped in interstate journey from the seller to the buyer, and that the defendant you are considering, knew them to have been stolen.

In other words, you have to find:

One, that they were in an interstate shipment.

Two, that the defendant knew them to have been stolen.

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1           But you do not need, on the substantive count,  
2  
3       to find that the defendant actually knew they were  
4       moving across a state line in an interstate shipment.  
5       In the conspiracy count, you do, and I will come back  
6       to that a little bit later.

7           As to the word "possession," the children's  
8       wear, if you so find, and the other merchandise, were  
9       in the defendant's "possession," if you find that the  
10      defendant had them in his power or control--obviously a  
11      truck load of cartons cannot be taken by a person and  
12      put in his pocket or held in his hand, but it is in his  
13      possession if a carton or cartons are under his command  
14      or in his control.

15          The government contends the defendants had  
16      possession of these cartons when, if you find at their  
17      direction, they were stored at Mr. Cerell's house and  
18      were theirs to dispose of. If you credit the testimony  
19      to this effect, this would be possession as the law  
20      defines it. Possession by a defendant can be either actual  
21      or constructive.

22          Constructive possession means that, although  
23      the goods are in the physical possession of somebody  
24      else, if a defendant knowingly has the power to exercise  
25      control over them or over their distribution, or what's



1 mbim 312

2 done with them, that defendant has constructive  
3 possession.

4 In connection with this count, I also want to  
5 define for you the terms "knowingly" and wilfully,"  
6 should it become appropriate to apply them.

7 An act is done knowingly, if it's done volun-  
8 tarily and purposely and not because of mistake, accident,  
9 mere negligence, or some other innocent reason.

10 An act is done wilfully, if it is done know-  
11 ingly and deliberately.

12 As to the fifth element, "value," you are  
13 instructed that the value in this context means: the  
14 cost price, either wholesale or retail, whichever is  
15 greatest. You need not find that each piece of  
16 children's wear had a value in excess of \$100. The  
17 question is whether the total value of the merchandise,  
18 which the government contends was put in the possession  
19 of the defendants, exceeded a hundred dollars.

20 Now, let us turn to the conspiracy count.  
21 Title 18, U.S., Section 371, provides as follows:  
22 "if two or more persons conspire to commit any  
23 offense against the United States, and one or more of  
24 such persons does an act to effect the object of the  
25 conspirators, each is guilty of a crime."

✱

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1  
2 In order to find a defendant guilty of conspiracy,  
3 as is charged in the first count of the indictment, you  
4 must find each of the following elements beyond a reason-  
5 able doubt:

6 First, that at some time during the period from  
7 on or about October 15 to October 25, 1975, the date of  
8 the filing of the indictment, you must find that an  
9 agreement existed between the defendant you are consider-  
10 ing and the co-conspirators, Crawford, Boyd, and Dixon,  
11 or others charged.

12 Second, that it was an object of this agreement:

13 One: For certain of the co-conspirators to  
14 steal goods, from a motor truck, that would be shipped in  
15 interstate commerce.

16 Second: That the defendant you are con-  
17 sidering would receive these goods to sell and dispose of.

18 Third: That the defendant knowingly  
19 associated himself with this conspiracy or agreement and  
20 participated in it.

21 Fourth: That one of the co-conspirators  
22 knowingly committed at least one of the overt acts--which  
23 I will get to in a moment--set forth in the indictment,  
24 at or about the time and place charged.

25 Fifth: That either the agreement was



1 mblm 314

2 formed in the Southern District of New York, or an overt  
3 act occurred in the Southern District of New York.

4 As I have said before, the Southern District  
5 includes Manhattan and The Bronx, but does not include  
6 Brooklyn, Queens and Long Island.

7 Let me give you those again, so that you have  
8 those firmly in mind, because those are the elements  
9 you have to consider:

10 First, that at some time during the period from  
11 on or about October 15, 1972 to when the indictment was  
12 filed, October 25, 1975, an agreement existed between  
13 the defendant under consideration, and any co-conspirator,  
14 as charged: Crawford, Boyd, Dixon, or anyone else so  
15 charged by the grand jury.

16 Second, that it was an object of this agreement  
17 that certain of the co-conspirators would steal goods  
18 from a motor truck, which goods were being shipped in  
19 interstate commerce. That the defendant--and in this  
20 regard, the object of this agreement has to be that the  
21 defendant knew that the goods were being shipped in  
22 interstate commerce; that a member of the conspiracy  
23 knew that it was part of the agreement that the shipment  
24 from which the goods would be stolen was moving in  
25 interstate commerce; and, two, that Defendants Cerell

1 mblm 315

2 and/or Viruet, whoever you are considering, would receive  
3 these goods to sell and dispose of.

4 Three, that the defendant knowingly associated  
5 himself with the conspiracy and participated in it.

6 Four, that one of the conspirators knowingly  
7 committed at least one of the overt acts at or about the  
8 time and place alleged.

9 Fifth, that either the agreement was formed in  
10 the Southern District or an overt act occurred in the  
11 Southern District.

12 Now I will get down to details on that.

13 Let's consider the first element:

14 As you gather, a conspiracy is a agreement,  
15 or an understanding by two or more persons to accomplish  
16 a criminal or unlawful act. To establish this, the govern-  
17 ment is not required to show that two or more persons  
18 sat around a table and entered into a solemn pact orally  
19 or in writing, stating that they have formed a conspiracy,  
20 or to set forth the details or the means by which it is  
21 to be achieved. Your common sense will tell you, I am  
22 sure, that when persons in fact undertake to enter into  
23 a criminal conspiracy, much is left to the unexpressed  
24 understanding. What the evidence must show in order  
25 to establish that a conspiracy existed, is that its



1 mblm 316

2 members in some way or manner expressly or by implication,  
3 came to a common understanding to violate the law or to  
4 accomplish an unlawful plan.

5 To determine whether there has been such a  
6 conspiracy, you may judge the facts and the conduct of  
7 the alleged co-conspirators, which are done to carry out  
8 an apparent criminal purpose. The old adage: "Actions  
9 speak louder than words," is obviously applicable here.  
10 Often the only evidence available is that of the dis-  
11 connected acts or conduct upon the part of the individuals  
12 charged, which acts or conduct, however, when taken by  
13 you together and considered as a whole, permit the  
14 inference that the conspiracy existed as conclusively  
15 as direct proof. In short, the items of evidence are  
16 not to be viewed in isolation, but together with each  
17 other. You are to view the totality of all the evidence.

18 I have mentioned earlier that a conspiracy has  
19 sometimes been called "a partnership" for criminal  
20 purposes, in which each member of it becomes an agent  
21 of each other member. Each person in a conspiracy may  
22 perform separate and distinct acts at different times  
23 and in different places. All the conspirators need not  
24 be acquainted with each other. They may not have  
25 previously associated together. One of the defendants

1 mblm 317

2 may know only one member of the conspiracy. If he enters  
3 into an unlawful agreement with that other member of the  
4 conspiracy, he becomes a party to the conspiracy. One  
5 conspirator may play a major role while another plays a  
6 minor one.

7 Thus, the guilt of one is not governed by the  
8 extent, the duration, or whether he played a greater or  
9 a lesser role. In other words, it is not required that  
10 a person be a member of the conspiracy from the very  
11 start. He may join it at some point during its progress  
12 and be held responsible for all that has been done to  
13 further it after he joined, and that may thereafter be  
14 done during its existence while he remains a member.  
15 In other words, every conspirator is fully responsible  
16 for what every other co-conspirator does or says in  
17 furtherance of the conspiracy, whether he knows about it  
18 or not, whether he specifically approves of it or not;  
19 that is, as long as you have found such a person to be a  
20 member of the conspiracy.

21 So, ladies and gentlemen, you must determine  
22 whether or not the proof has established here the  
23 existence of the conspiracy or the agreement that is  
24 charged in the indictment. In deciding this, you must  
25 consider all the evidence with respect to the conduct,



1 mblm 318

2 acts, and declarations of each of the alleged co-con-  
3 spirators and such inferences as you may reasonably  
4 draw from that. It is sufficient to establish the  
5 existence of the conspiracy if from the proof of all  
6 the relevant facts and circumstances, you find beyond a  
7 reasonable doubt that the minds of at least two alleged  
8 co-conspirators met in an understanding way to accom-  
9 plish by the means charged, the objects of the con-  
10 spiracy as charged in the indictment.

11 If you do conclude that the conspiracy as  
12 charged did exist, you must then determine whether Mr.  
13 Cerell and Mr. Viruet here became members of it. The  
14 defendant's participation in a conspiracy, if you find  
15 that one existed, must be established by the independent  
16 evidence of his own acts, conduct, and statements, as  
17 well as those of other alleged co-conspirators, and the  
18 reasonable inferences to be drawn from them. In this  
19 connection, evidence was received as to other occasions  
20 not charged in the indictment, when Chester Crawford  
21 allegedly had dealings with each of the defendants  
22 regarding other stolen items: wine, checks, for  
23 example.

24 This evidence, if credited by you, is to be  
25 considered only on the question of whether a defendant was

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engaged in a course of conduct with Crawford, to deal in stolen items; and only to the extent that it bears, if you so find, on the fact of a defendant's connection with this particular highjacking. Neither defendant is on trial for any charge other than those contained in this indictment, and for fencing the stolen items referred to in this indictment.

To find either defendant a member of this conspiracy, you must upon all the evidence be satisfied beyond a reasonable doubt that the defendant was aware of its unlawful purpose; that he was a willing participant with intent to advance its purposes, and that he joined the conspiracy with a specific criminal intent; that is, with a deliberate purpose to violate the law.

I am not going to review the testimony, since the fact area here was relatively simple, and counsel have done it well; but I think a short review of the list of witness in this case is appropriate.

The government called Teddy Smith, who was the driver of the highjacked vehicle; Harry Hyman, who was the president of Modern Trucking; Chester Crawford, who said he was the ringleader of the highjackers; Mr. Bellikoff, who was an officer of the Tempo Foundations, one of the shippers; a Mr. Imgram, who was an employee at



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2 City Cooling; Mr. Bursey of the FBI; James Dixon, who  
3 said he took Teddy and drove him around New York follow-  
4 ing the highjacking; Carlton Boyd, who said he had driven  
5 the truck away from the highjack scene; and FBI Agent  
6 Garber.

7 Defendant Cerell called Mrs. Cerell, his wife;  
8 one, Roseanne Andersen, a next-door neighbor; Mrs. Rose  
9 Cerell, his mother; and Mr. Frank Cerell himself took  
10 the stand before you.

11 Mr. Viruet called a Richard Waegerle, a neighbor;  
12 Sam Eason, also known as "Buster," the gentlemen who said  
13 he was riding the passenger side of the truck on the  
14 way from the highjacking out to Long Island; Anita  
15 Lauanders, an officer of City Cooling during its existence  
16 before it was sold; Mr. Viruet himself took the stand,  
17 and a Walter Tennery was called as his last witness.

18 The contentions of the parties hereto, although  
19 there has been extensive evidence, were relatively  
20 simple.

21 The government contends that it has proved  
22 that there was an agreement to highjack a truck, and  
23 there is no dispute that there was a highjacking of a  
24 truck. The government further contends that the agree-  
25 ment was that the merchandise was to be taken to the

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2 home of Mr. Cerell, or was to be put into the possession  
3 of Mr. Cerell and Mr. Viruet, to dispose of as fences,  
4 and that's in the first count; that's what the govern-  
5 ment charges the agreement was.

6 And in the second count, the government alleges  
7 that it has proved that this, in fact, was carried  
8 out and that this merchandise was put into the possession  
9 of the defendants for disposition as fences, and that they  
10 did so dispose of it.

11 Defendants' contentions are that this did not  
12 occur at all; that there was no such incident; that no  
13 truck ever came to Mr. Cerell's home, and there was -- in  
14 no way did they have any participation whatsoever; that  
15 this is something made up by other participants to  
16 further themselves in their embroilment with the law.

17 Those are the contentions that you are going  
18 to have to choose between. There are, obviously, many  
19 other contentions raised in the various summations and  
20 I am not going to refer to those, but you should consider  
21 all of the contentions and all of the evidence; and just  
22 because I have summarized it in that fashion, does not  
23 mean that you should not consider every aspect of the  
24 case, because you should.

25 As to the second element of the conspiracy, if



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2 I may return to that, that second element, as you may  
3 recall, was that it was an object of the agreement that  
4 certain co-conspirators would steal goods, from a motor  
5 truck, being shipped in interstate commerce, and that  
6 Defendants Cerell and Viruet would receive these goods  
7 to sell and dispose of.

8 The government must establish that one of the  
9 purposes of this agreement was to achieve the substantive  
10 offense charged in Count 2 and that is, to put the  
11 defendants on trial here, in possession of stolen goods  
12 to dispose of. Thus, as in the case of Count 2, the  
13 government must establish that a defendant on trial knew  
14 that the plan was that the goods to be given him to  
15 dispose of would be stolen. In addition, with respect  
16 to the conspiracy count, the government must establish  
17 an additional element of intent. You will recall that  
18 I said, in reference to the substantive or the possession  
19 count, that it was not necessary for the government to  
20 prove that the defendant knew the goods had been moving  
21 in interstate commerce. If you found that the goods, in  
22 fact, were traveling interstate, that finding was  
23 sufficient for the federal substantive violation.

24 However, for the conspiracy count, for there  
25 to be a violation of the law under the conspiracy count,

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2 the government must establish that a defendant knew that  
3 the goods he was conspiring to steal or to fence, were  
4 to be those that were moving in interstate commerce.

5 In this connection, the government contended that there  
6 is proof that Crawford, one of the alleged co-conspirators,  
7 had selected Teddy's truck as the one to be highjacked  
8 sometime before, and knowing that Crawford knew that this  
9 truck regularly went through New York depot to distribu-  
10 tion centers in New Jersey. If you find this as a fact,  
11 then you may find that this element has been satisfied.

12 As to all of these elements, let me repeat:  
13 it is for you to determine whether you find these facts  
14 or not.

15 Now, as to the third element, in determining  
16 whether a defendant became a member of the conspiracy,  
17 you must determine not only whether he participated in  
18 it, but whether he did so with knowledge of its unlawful  
19 purpose. Did he join it with awareness of at least some  
20 of the basic aims and purposes of the conspiracy? Knowledge  
21 is a matter of inference from facts proved. Medical  
22 science has not devised a way to permit us to go into  
23 a man's mind and know with certainty what he knew or  
24 thought at some time in the past. However, you do have  
25 before you testimony of certain acts on the part of these



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2 defendants from which, if you credit that testimony from  
3 which the government contends can be gleaned, and from  
4 it which the government contends it has shown knowledge  
5 on the part of each defendant, of an unlawful purpose to  
6 this conspiracy.

7           It is not necessary that the defendant be  
8 fully informed as to the details of the scope of the  
9 conspiracy in order to justify your conclusion of knowledge  
10 on his part. Also, for a finding of guilty knowledge, you  
11 need not find that a defendant knew the fullest extent  
12 of the conspiracy and all of its activities and actors.  
13 I charge you that in this connection, you may not draw  
14 an adverse inference of participation in this conspiracy  
15 from the mere association or friendship of the defendant  
16 and any other person. I further charge you that the  
17 mere presence at the scene of an event allegedly connected  
18 with the conspiracy, knowing that a crime is being  
19 committed, is not sufficient to establish that a defendant  
20 aided or abetted or participated in the crime unless you  
21 find beyond a reasonable doubt that the defendant was  
22 a participant and not **merely a knowing** spectator.

23           The existence of the conspiracy may be established  
24 and one's membership in it may be established by direct  
25 or circumstantial evidence.

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2 Direct evidence is where a witness testified  
3 to what he saw, heard, and/or observed. What he knows  
4 of his own knowledge, that which came to him through the  
5 use of his own senses. That is direct evidence.

6 Circumstantial evidence, on the other hand, is  
7 where facts are established from other facts from which,  
8 in terms of common experience, you can logically conclude  
9 that the facts sought to be established do exist.

10 Let me give you an example, so that you can  
11 see what I am talking about:

12 Let's assume that when you came into the court-  
13 room this morning the sun was shining, the blinds were  
14 drawn, so that you could not see out, and it had been  
15 a dry, clear day when you entered the building. The  
16 fact it was a dry, clear day when you entered, there is  
17 direct evidence, because you observed that, you looked  
18 at the heavens and saw what it was.

19 But let's assume that at the close of my charge  
20 a man walked in with an umbrella, and is shaking water  
21 off the umbrella, walks in through that door; and another  
22 man comes in and has a raincoat on with spots of water  
23 all over it; you could conclude from that evidence, which  
24 is direct evidence of seeing the man in the umbrella,  
25 you could conclude that since the time you came into the



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1 building, the sun had stopped shining and it had begun to  
2 rain. In other words, the circumstantial evidence would  
3 permit you to draw a second fact from it, because of the  
4 reasonable inference that was permitted. That is all  
5 there 's to circumstantial evidence. You infer one fact  
6 which logically flows from another fact which is proven  
7 before you.  
8

9 Circumstantial evidence, if you believe it,  
10 is of no less value than direct evidence. In either case,  
11 whether the evidence is circumstantial or direct, you  
12 must be convinced beyond a reasonable doubt of the guilt  
13 of any defendant on any count and on each element of the  
14 count.

15 If you find that the government has sustained  
16 the elements of a defendant's knowing participation in  
17 the conspiracy, then we reach the next element, which is  
18 that an overt act to effect the object of the conspiracy  
19 was committed by at least one of the co-conspirators  
20 after unlawful agreement was made.

21 Now, getting down to that mysterious word, "overt  
22 act," an overt act, which is a long-time honored legal  
23 word, means nothing more than some step, action, or  
24 conduct which is taken to achieve, accomplish, or further  
25 the objectives of the conspiracy. Thus showing that the

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conspiracy is more than mere talk.

The purpose of requiring proof of an overt act is that while parties might conspire and agree to violate the law, they may change their mind before doing anything, and do nothing to carry it into effect; in which event, that would not constitute an offense. The overt act which the government must prove need not be a criminal act nor must the government prove all of the overt acts which are alleged in the indictment. Proof of any one overt act by any member of the conspiracy is sufficient if you find that it has been committed beyond a reasonable doubt.

The overt acts listed in the indictment are as follows:

"In pursuance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

"One: In or about February 1973, Leon Rogers; Samuel Eason, also known as "Buster"; Chester Crawford; Carlton Boyd and James Dixon met in the vicinity of 121st Street and Manhattan Avenue in Manhattan in New York City.

"Two: On or about the 21st day of February 1973,



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2 Leon Rogers, with James Dixon as a passenger, double-  
3 parked an automobile in the vicinity of 24th Street and  
4 Tenth Avenue in Manhattan in New York City.

5 "Three: On or about the 21st day of February  
6 1973, Samuel Eason and Carlton Boyd stood in the  
7 vicinity of 24th Street and Tenth Avenue in Manhattan  
8 in New York City.

9 "Four: On or about the 21st day of February  
10 1973, Chester Crawford parked in an automobile in the  
11 vicinity of 24th Street and Tenth Avenue in Manhattan in  
12 New York City.

13 "Five: On or about the 21st day of February  
14 1973, Samuel Eason and Carlton Boyd entered the automobile  
15 driven by Chester Crawford in the vicinity of 24th Street  
16 and Tenth Avenue in Manhattan.

17 "Six: On or about the 21st day of February  
18 1973, Chester Crawford drove an automobile with Samuel  
19 Eason and Carlton Boyd as passengers, behind a Modern  
20 Trucking Co. truck in the vicinity of 24th Street and  
21 Tenth Avenue to the vicinity of 23rd Street and Ninth  
22 Avenue in Manhattan.

23 "Seven: On or about the 21st day of February  
24 1973, Leon Rogers, with James Dixon as a passenger, drove  
25 behind the automobile driven by Chester Crawford, from

1 the vicinity of 24th Street and Tenth Avenue to the  
2 vicinity of 23rd Street and Ninth Avenue.  
3

4 "Eight: On or about February 21"--in the same  
5 year; these are all on February 21 of '73 -- "Samuel  
6 Eason and Carlton Boyd got out of the automobile driven  
7 by Chester Crawford and got into the cab of the Modern  
8 Trucking Co. truck.

9 "Nine: On the 21st of February, Samuel Eason  
10 and Carlton Boyd directed the driver of the Modern Truck-  
11 ing Co. motor truck to drive several blocks."

12 These are the overt acts that are charged  
13 here, and as I said before, you must find one of these.

14 "Ten: On or about 21 February, Samuel Eason,  
15 Carlton Boyd, Leon Rogers and James Dixon placed the  
16 truck driver in the back seat of the automobile driven  
17 by Leon Rogers.

18 "Eleven: On or about 21 February, Leon Rogers  
19 with James Dixon as a passenger, drove around New York  
20 with the truck driver in the back seat.

21 "Twelve: On or about 21 February, Carlton  
22 Boyd drove the Modern Trucking Co. motor truck with  
23 Samuel Eason, from downtown Manhattan to Long Island.

24 "Thirteen: On or about 21 February, Chester  
25 Crawford drove an automobile from Manhattan to Long



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2 Island.

3 "Fourteen: On or about 21 February, Chester  
4 Crawford had a telephone call with Paul Viruet.

5 "Fifteen: On or about 21 February, Chester  
6 Crawford had a telephone conversation with Frank Cerell,  
7 Jr.

8 "Sixteen: On or about 21 February, Frank  
9 Cerell, Jr. and Paul Viruet traveled in an automobile  
10 on Long Island.

11 "Seventeen: On or about 21 February, Paul  
12 Viruet, Samuel Eason, Carlton Boyd and Chester Crawford  
13 unloaded the Modern Trucking Co. motor truck at Frank  
14 Cerell's home on Long Island."

15 Those are the overt acts that are charged and  
16 as I have said under the fourth element of the conspiracy,  
17 you must find that one of the conspirators knowingly  
18 committed at least one of the overt acts set forth in  
19 the indictment at or about the time and place alleged.

20 It is not necessary, following up what I  
21 have just said, that the government must prove that each  
22 member of the conspiracy committed or participated in  
23 an overt act; since as I have told you before, the act  
24 of any member, done in furtherance of the conspiracy,  
25 becomes the act of all the other members. The overt act

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2 need not have occurred at the precise times and the  
3 precise places as alleged.

4 So too, while the indictment charges that the  
5 conspiracy began on or about October 15, 1971 and  
6 continued up to October 10, 1975, it is not essential  
7 that the government prove the conspiracy started or  
8 ended on or about these specific dates. It is sufficient  
9 if you find that, in fact, the conspiracy was formed  
10 and existed for some substantial time within the period  
11 set forth in the indictment, and that an overt act  
12 committed in furtherance of its objective was done at  
13 or about the time alleged.

14 I have not referred to much evidence on which  
15 the parties rely. I want to firmly say that all evidence,  
16 whether or not I referred to it, is important and should  
17 be considered by you.<sup>1</sup> I am referring to testimony. I  
18 sought to state the substance of it with complete accuracy.  
19 However, again I wish to say if I made any reference to  
20 testimony which does not agree with your recollection,  
21 you are to disregard my statement, for it is your recollec-  
22 tion and yours alone that governs.

23 I also want to say that just because evidence  
24 is uncontradicted in the record, you need not accept it  
25 if you do not find it to be believable. You alone, as I



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2 have said before, are called upon to decide the fact issues.  
3 How do you do this? Your determination, ladies and  
4 gentlemen, on the issues of credibility, depends on the  
5 impression, very largely, that a witness or witnesses  
6 made upon you. Was that witness telling the truth, or  
7 giving you an accurate version of what happened?

8 As I said, when you walk in the door of this  
9 courtroom and sit in the jury box while the trial is  
10 going on, and while you are deliberating, you keep  
11 your common sense and your good judgment with you. You  
12 decide whether a witness has told a truthful and straight-  
13 forward story; whether the witness attempted to conceal  
14 anything; whether he or she had a motive to testify  
15 falsely; whether there is any reason a witness might color  
16 his or her testimony.

17 The ultimate question for you to decide in  
18 passing upon credibility is: Did the witness that you  
19 are considering, tell the truth here before you as to  
20 essential matters? It is for you to say whether a witness  
21 is truthful in whole or in part, in light of his or her  
22 demeanor and all the evidence in the case. If you find  
23 that any witness--and this applies to all the witnesses--  
24 if you find that any witness has wilfully testified  
25 falsely as to any material matter, you may reject the

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2 entire testimony of that witness, or you may accept such  
3 part as commends itself to your belief or which you may  
4 find is corroborated by other evidence in the case.

5 The government called Mr. Crawford and Mr.  
6 Boyd and Mr. Dixon to testify. Defendant Viruet called  
7 Samuel Eason to testify. These are men who claim that  
8 they conspired with the defendants in this case. That a  
9 witness asserts he is an accomplice, may be considered  
10 by you as bearing upon his credibility and upon his  
11 believability. However, it does not follow that just  
12 because a person asserts participation in a crime, that  
13 he is not capable of giving a truthful version of what  
14 occurred. Such testimony, however, should be viewed with  
15 great caution and scrutinized carefully. Did any alleged  
16 co-conspirator here give false testimony or color  
17 testimony contrary to fact, hopeful that this testimony  
18 would result in favorable treatment at some time, or did  
19 these witnesses or any of them make a clean breast of  
20 their wrongdoing and tell the truth as to significant  
21 matters? That is your question.

22 Further, I want to say, there is no requirement  
23 in the federal court that the testimony of an accomplice  
24 be corroborated. A conviction may rest upon the uncor-  
25 roborated testimony of an accomplice or accomplices if



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you believe it, if you find it credible.

The fact that certain witnesses were government employees, agents of the Federal Bureau of Investigation, does not entitle their testimony to any greater weight or consideration than that accorded to any other witness in the case; nor does it entitle them to any less consideration. You are to evaluate their credibility the same way you would do that of any other witness.

The law permits but does not require a defendant to take the stand in his own behalf. In this case, both Mr. Cerell and Mr. Viruet have taken the stand. Obviously each has a deep personal interest in the result of this prosecution. Interest, as you are doubtless aware, creates a motive for testifying falsely. The greater the interest, the stronger the motive; and the defendant's interest in the result of this trial is of a character possessed by no other witness. In appraising the credibility of either Mr. Cerell or Mr. Viruet, you should take such interest in the outcome into consideration.

However, and I want to say this as firmly as anything I have said before: It by no means follows, that simply because a person has a vital interest in the end result, that he is not capable of telling you a

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truthful, straightforward story. It is for you to decide to what extent, if at all, his interest has colored or affected his testimony.

Defendant Viruet has introduced evidence of his good reputation in his community for honesty and veracity. Assuming you credit this testimony, you may properly consider whether a person with this character would perpetrate the crimes charged in this indictment. Therefore, you should consider this evidence in the case in determining whether the prosecution has proved Mr. Viruet guilty beyond a reasonable doubt. Evidence of good reputation may in itself create a reasonable doubt as to guilt where, without such evidence, no reasonable doubt would exist.

On the other hand, if on all the evidence, you are satisfied beyond a reasonable doubt that Mr. Viruet is guilty, a showing that he previously enjoyed a reputation of good character does not justify or excuse the offense. You should not acquit him merely because you believe he is a person of good repute. The testimony of a character witness is a reflection of a reputation in the community. The testimony of character reputation is not to be taken by you as a witness' opinion as to the guilt or innocence of the defendant on the charges



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2 in this indictment. The guilt or innocence of the  
3 defendant is for you and you alone to determine.

4 You must consider -- I want to say this generally  
5 -- you must consider each defendant separately as if he  
6 alone were on trial, and you must consider each count  
7 separately, and you shall return a separate verdict as to  
8 each defendant and on each count.

9 If you fail to find -- fail to find beyond a  
10 reasonable doubt that the law has been violated, you  
11 should not hesitate for any reason, to return a verdict  
12 of "acquittal"; but if, on the other hand, you should  
13 find that the law has been violated as charged, you  
14 should not hesitate, because of sympathy or other reason,  
15 to render a verdict of "guilty" as a clear warning that  
16 a crime of this character may not be committed with  
17 impunity. The public is entitled to be assured of this.

18 I am getting close to the end.

19 The government, to prevail against either  
20 defendant, must as I have said, prove each essential  
21 element of each charge by the required degree of proof,  
22 as I have charged you. If the government succeeds, your  
23 verdict should be "guilty." If the government has failed,  
24 your verdict must be "not guilty." Your verdict, ladies  
25 and gentlemen, must be unanimous.

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Under your oath as jurors, you cannot and are not to allow any consideration of a sentence, which might be imposed on any defendant if convicted, to enter into your deliberations or influence your verdict in any way. Your duty is to decide the facts here, to decide this case solely and only upon the evidence before you. In the event of a conviction, the duty of imposing sentence rests solely with the Court.

Each of you, ladies and gentlemen, as a juror, is entitled to his or her own opinion; but each should, however, exchange views with your fellow-jurors. That is what jury deliberation means: to discuss and consider the evidence, to listen to the arguments of fellow-jurors, to present your individual views, to consult with one another, and to reach agreement based solely and wholly on the evidence, if you can do so without violation to your individual judgments.

Each must decide the case for himself or herself after a consideration and discussion with his or her fellow-jurors; but you should not hesitate to change an opinion which, after discussion with your fellows, appears erroneous. However, equally, if after careful consideration of all the evidence, the arguments of your fellow-jurors, you entertain a conscientious



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2 view that differs from others, you are not to yield your  
3 conviction simply because you are outnumbered or out-  
4 weighed.

5 Your final vote must reflect your conscientious  
6 conviction as to how the issue should be decided. If  
7 the government has failed to carry its burden, you should  
8 acquit; that is your duty. If the government has  
9 carried its burden, you must not flinch from your sworn  
10 duty, but you must convict.

11 Ladies and gentlemen, that concludes my charge  
12 on the law.

13 Gentlemen, do you have any matters you wish  
14 to bring to my attention?

15 MR. REILLY: May we see you at the side bar?

16 THE COURT: We will go into the robing room.

17 MR. COHEN: May I approach the bench?

18 THE COURT: Yes, we are going in the robing  
19 room.

20 (In the robing room.)

21 MR. COHEN: Judge, I thought I would like to  
22 have you say something as to what credibility could the  
23 jury take from the fact that anyone had a previous  
24 record. In other words, whether or not they can give  
25 him full credibility or whether or not, because of a

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2 previous conviction, they may give him less credibility,  
3 something in that vein, because I didn't hear you say  
4 anything about that, and I was waiting for you to say  
5 something; because the law specifically says that, and  
6 I think we should point out that they should evaluate  
7 the credibility of a witness who has a prior record.

8 THE COURT: I don't know that there is any  
9 such specific charge.

10 MR. REILLY: There is no requirement or even  
11 recommended charge for that, your Honor. It was certainly  
12 a matter of summation in great detail. I pointed that  
13 out myself in my summation.

14 THE COURT: Yes, I understand your position,  
15 but I decline to specifically point that out.

16 MR. EIBEL: Your Honor, I have no requests.

17 THE COURT: Mr. Reilly?

18 MR. REILLY: I note -- I may be wrong, but I  
19 don't think your Honor did charge similar acts as a  
20 pattern.

21 THE COURT: I did.

22 MR. REILLY: All right, then I withdraw it.

23 MR. COHEN: Yes.

24 THE COURT: I didn't charge it as a pattern; I  
25 charged it as a course of conduct.



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2 MR. EIBEL: Course of conduct.

3 MR. REILLY: All right. My only other comment  
4 was that Mr. Wolf of Fairy Tale and Mr. Crowe of the FBI  
5 were not mentioned, but I don't think it warrants any  
6 special issue.

7 MR. EIBEL: At one time, your Honor said --  
8 I think you were referring to -- may have been looking  
9 at the old indictment, 1971; but it's unimportant, it was  
10 only mentioned once.

11 MR. COHEN: There was a superseding indictment  
12 and then -- you did mention '72 first, and then during  
13 the course of it --

14 MR. EIBEL: Just one time, you mentioned it  
15 as 1971. I don't think it's of significance.

16 THE COURT: If there is no problem with it,  
17 I certainly don't want to get into --

18 MR. EIBEL: There is not.

19 THE COURT: All right. I appreciate your  
20 calling that to my attention.

21 MR. REILLY: This is the re-redacted indictment.

22 THE COURT: Let's go outside.

23 (In open court: jury present.)

24 (The alternate juror was excused.)

25 THE COURT: The remaining 12 jurors may now

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2 retire to consider your verdict. The marshal will be  
3 sworn and take charge of you.

4 (One United States marshal was duly sworn.)

5 (At 11:20 a.m., the jury retired to deliberate  
6 upon a verdict.)

7 THE COURT: Gentlemen, I would suggest that you  
8 put all of your exhibits in some place where, if that  
9 is what is desired by the jury, they could be given to  
10 the jury by the clerk, without the necessity of summoning  
11 everybody including the reporter.

12 MR. EIBEL: Your Honor, I believe that Mr.  
13 Reilly has all the exhibits that the defense put in as  
14 defendant's exhibits. I think that includes the gas  
15 receipts?

16 MR. REILLY: That's correct, I have them all.

17 MR. EIBEL: Mr. Reilly has them all.

18 THE COURT: May it be stipulated that if there  
19 is a note calling for an exhibit, that that may be  
20 turned over without the necessity of everybody convening  
21 for that purpose?

22 MR. EIBEL: Yes.

23 MR. COHEN: I so stipulate.

24 MR. REILLY: The government so stipulates.

25 THE COURT: That will save quite a little bit



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2 of time.

3 (Recess.)

4 (In open court; jury not present.)

5 MR. REILLY: Mr. Cohen is here.

6 You have no objection to proceeding without  
7 Mr. Cerell?

8 MR. COHEN: No, I don't have any objection  
9 to my client's not being here.

10 THE COURT: We have a note here and, really,  
11 it's counsel's job to respond to this. The problem is,  
12 your client's apparently gone to lunch.

13 MR. COHEN: No, one is here. The other one  
14 just went down to get some containers of coffee; but  
15 your Honor, I feel that if this is just a rereading of  
16 the testimony and if I can waive their appearance --

17 THE COURT: It has not anything to do with  
18 testimony. It has to do with exhibits, with the dates  
19 that things happened.

20 (Note from jury marked Court Exhibit 1.)

21 MR. REILLY: Your Honor, with respect to  
22 Crawford's arrest, he testified to the best of his  
23 recollection when he was arrested.

24 THE COURT: Can you all agree on when that is?

25 MR. EIBEL: My recollection is April of '73.

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2 MR. REILLY: He said April or May of '73; and  
3 on questioning, he said he thought it was April. He  
4 didn't remember whether it was April or May. I don't know  
5 that it's particularly relevant but --

6 MR. COHEN: I don't remember May. He did say  
7 April of 1973 that he was arrested.

8 THE COURT: If you have any problems, we'll  
9 have to go through the stenographer's notes and pull it  
10 out.

11 MR. REILLY: Then the date of Crawford's  
12 statement on the FBI we can determine. It was in evidence  
13 and it was in the 3500 material, something like that  
14 November. We will look at it.

15 MR. COHEN: November there was an arrest of the  
16 defendant.

17 MR. REILLY: That is '74. This is '73.

18 THE COURT: That statement was used as an  
19 exhibit when he was examined. It may be marked for  
20 identification. I know somebody mentioned the date.

21 MR. EIBEL: If he did, there is no problem.

22 MR. REILLY: Then the date of the arrest of  
23 the two defendants was November 4, 1974.

24 THE COURT: Can you work that up right now?

25 MR. REILLY: Yes, we can do that.



(Pause.)

THE COURT: If you gentlemen would answer those questions on a sheet of yellow paper, responsive to that note by question number, then I will hand that back to them; and also, we can give them the exhibits they ask for at the same time. The marshal will just deliver them.

(Recess.)

THE COURT: Mr. Reilly is getting certain material; but defense counsel are here, and with their consent, I am going to put the date of the indictment on Court's Exhibit 1. We put the answer to 4 and to 5 in ink on this. I am going to write in, "The answer to 3 is to be supplied as soon as it is obtained," and the marshal may now give Court's Exhibit 1 back to the jury together with the exhibits. Take them all in. We're going to give them the exhibits and the indictment.

(Recess.)

(In open court; jury not present.)

THE COURT: We have a new note:

"We find we also need the date of the statement in which Crawford first identified Cerell and Viruet as receivers of the stolen merchandise."

That is obviously on the statement also.

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2 MR. REILLY: That is the same date he identified  
3 Frank and Viruet; that is December 17.

4 MR. EIBEL: That's correct.

5 THE COURT: December 17, 1973?

6 MR. REILLY: Right. That is the same answer.  
7 Is that the same answer?

8 MR. EIBEL: This one should be --

9 MR. REILLY: Let's make sure that is the same.  
10 Let's get the 3500.

xxx 11 (Note from jury marked Court Exhibit 2.)

12 MR. REILLY: The other answer is December 17,  
13 1973 to the new question.

14 THE COURT: In answering Question 3 in Court's  
15 Exhibit 1, which we will now mark Court's Exhibit 3,  
16 what dates am I to put?

17 MR. EIBEL: October 17, 1972.

18 (Answer to Question 3 in Court's Exhibit 1  
xx 19 marked Court Exhibit 3.)

20 THE COURT: October 17, 1972.

21 MR. COHEN: The date of first arrest.

22 THE COURT: This says when Crawford was first  
23 arrested.

24 MR. REILLY: October 19, 1972 and October 22  
25 or 23, 1972.



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2 THE COURT: All right, so I will have Court's  
3 Exhibits 2 and 3 that you gentlemen can look at at this  
4 point. I will have those returned to the jury by the  
5 marshal.

6 (Recess.)

7 (At 4:45 p.m., in open court; jury not present.)

8 THE COURT: I'd like to hear a little argument  
9 on this, Mr. Reilly, the case called to my attention.  
10 My clerk and I were talking about this -- it seemed to  
11 me that if this was a conspiracy of five men to steal  
12 and fence merchandise from a truck, period; suppose they  
13 sat around in the apartment and said, "We're going to  
14 knock off a truck and sell it." Is that a federal crime?

15 MR. REILLY: That is a federal crime if that  
16 truck was moving in interstate commerce, even if they  
17 did not know.

18 THE COURT: But if they don't have a specified  
19 truck, that is my problem. Suppose that --

20 MR. REILLY: If they did not have a specific  
21 truck in mind, then it may -- if it was just a general  
22 truck, perhaps that would be -- there would be a problem,  
23 but that is not the case here.

24 THE COURT: That is why I get back to the fact  
25 that this jury has got to conclude that Crawford had in

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2 mind knocking off a truck that he knew to be moving in  
3 interstate commerce.

4 MR. REILLY: That is a totally different  
5 question.

6 THE COURT: That is not what they asked me.  
7 That is what I charged them in the beginning.

8 MR. REILLY: I understand you charged it, but  
9 under the Feola case, that is no longer required. This  
10 distinction between --

11 THE COURT: You just agreed with me. You just  
12 agreed with me and said that if they had a conspiracy to  
13 knock off any old truck that they happened to find  
14 moving up Lafayette Street --

15 MR. REILLY: Yes.

16 THE COURT: -- that conspiracy is not a federal  
17 conspiracy.

18 MR. REILLY: I disagree, your Honor; no.

19 THE COURT: What?

20 MR. REILLY: If that particular truck that they  
21 chose was --

22 THE COURT: They hadn't chosen a truck.

23 MR. REILLY: But they have chosen a truck in  
24 this case, your Honor.

25 THE COURT: I know, and that is why I say, you



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2 have got to bring in the fact that they had, in fact,  
3 chosen a truck and --

4 MR. REILLY: They had chosen a truck; but even  
5 if Crawford didn't know it was going to Jersey, but had  
6 just chosen that truck and told the others, "I have  
7 picked out the truck, I am going to highjack it," and  
8 Crawford didn't know it was going to Jersey, he didn't  
9 know where it was going, he just knew it was going out  
10 of the terminal on that particular day; but if, in fact,  
11 that truck was going to New Jersey, then it would be a  
12 federal crime. If, in fact, however, that truck was only  
13 going to The Bronx, it would only be a state crime. And  
14 Crawford's knowledge of whether it was a --

15 THE COURT: I see what you are saying. All  
16 right. What you want me to charge, in effect, is that  
17 they had selected a truck which, in fact, was going to  
18 New Jersey.

19 MR. REILLY: A specific shipment. That is  
20 sufficient.

21 THE COURT: That is what you are saying this  
22 Feola case holds?

23 MR. REILLY: That is correct, your Honor,  
24 because the knowledge -- the Feola case says in the very  
25 last paragraph, that: "Where the substantive offense

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2 does not require actual knowledge, then in a conspiracy  
3 case, that knowledge will also not be required to  
4 establish federal jurisdiction."

5 THE COURT: I see. All right. I will hear  
6 from you in opposition, because I think that probably is  
7 what the Feola case says.

8 MR. COHEN: If your Honor please, at this time  
9 I want the record to be noted that I am subscribing to  
10 what Mr. Eibel is saying in connection therewith, so  
11 that --

12 THE COURT: You haven't heard what he said yet.

13 MR. COHEN: Whatever it is, I am going to sub-  
14 scribe to it.

15 THE COURT: Let's go quickly to this because  
16 the jury has been waiting patiently for a half-hour for  
17 this information.

18 MR. EIBEL: If your Honor pleases, the Feola  
19 case, as I read it, refers to the statute that protects  
20 the safety of a federal officer in the performance of  
21 his duty, and the Feola case discusses the two-fold  
22 purpose of the statute, not only to protect the officer,  
23 but also to protect the proper administration of justice  
24 or whatever it was. I am being very rough, because I  
25 read it rapidly, but that's what it says. That isn't



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2 the statute or the purpose of the statute here.

3 We have only a single purpose: to prevent  
4 highjacking of interstate commerce. I see no analogy,  
5 and I don't think that the Crimmins case overruled in  
6 an interstate highjacking conspiracy.

7 THE COURT: I think Mr. Reilly is right. I  
8 instructed apparently under old law. Frankly, I think  
9 that under old law, if the jury were to credit Crawford,  
10 jurisdiction is found because Crawford knew he had  
11 picked out a truck going to New Jersey.

12 MR. REILLY: Yes, your Honor, but I have a  
13 difficulty with that, and that is that under the ol law  
14 of conspiracy, each member of the conspiracy would have  
15 to have known that it was a federal or interstate ship-  
16 ment. Otherwise, there could be no meeting of the minds  
17 on that critical element. Yet the fact that Crawford  
18 might have known it, and three people thought they were  
19 engaging in a state truck highjacking, would under  
20 Crimmins, I think, be a defective conspiracy count with  
21 respect to those other three individuals. For that  
22 reason, I am pressing the point. I don't believe the  
23 record establishes as well as I would like it to establish,  
24 that Mr. Cerrell knew that it was an interstate shipment.

25 THE COURT: All right.

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2 MR. EIBEL: Your Honor, I'd like to note my  
3 objection on the record to having a case which was submitted  
4 on one theory, and in the midst of the deliberation of  
5 the jury, changed, to submit a second theory which  
6 knocks out a vital part of the case that was submitted to  
7 the jury.

8 I think it most unfair and prejudicial to the  
9 defendants.

10 THE COURT: Well, no, you had no knowledge of  
11 what I was going to charge on the law until I charged it,  
12 so there was no effect on your defense. Your defense  
13 is based upon the indictment.

14 MR. EIBEL: Yes, there was, because the govern-  
15 ment submitted requests to charge.

16 THE COURT: I didn't have to give the government's  
17 requests to charge. I would charge what the law is as I  
18 best knew it.

19 MR. EIBEL: I know, but if your Honor please,  
20 the government did not except to your charge nor did the  
21 defendant, and the case was submitted to the jury for  
22 their consideration on the theory that it was an integral  
23 part of the proof.

24 THE COURT: I appreciate that, Mr. Eibel, but  
25 all I am saying is that the factual aspects of this case



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1 were elicited by both sides prior to any definitive state-  
2 ment by me on the law; and therefore, there was no  
3 prejudice to your clients by what I might charge on the  
4 law because you did not know what I was going to charge  
5 on the law in this regard until after the proof was in  
6 and after you had summed up.  
7

8 MR. EIBEL: But your Honor had charged that  
9 the conspirators or at least one of them, if I remember  
10 correctly, had to know that the shipment was an inter-  
11 state shipment or they could not find a conspiracy to  
12 hijack an interstate shipment. That is what your Honor  
13 charged. Now, that was based upon the proof that was  
14 submitted and the --

15 THE COURT: Well --

16 MR. EIBEL: May I finish, your Honor, please?  
17 I will be very brief.

18 That was submitted without objection by the  
19 other party, and I say now that to tell them after they  
20 have been in the midst of their deliberation for a  
21 number of hours, that they do not for the first time  
22 have to find an interstate character known to one of the  
23 conspirators in order to find the conspiracy, I think is  
24 highly prejudicial and erroneous.

25 That is the point that I am basing it on the

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2 record.

3 MR. COHEN: May I join now, may I join in with  
4 the objection? If your Honor is going to rule anything  
5 to the contrary, I want to take exception.

6 THE COURT: Very good, you may have an  
7 exception.

8 MR. EIBEL: I repeat my point just very briefly:  
9 that I don't think the Crimmins case is overruled  
10 because the analogy between the Feola case and the  
11 Crimmins case is not a proper one, since the statutes  
12 involved, the substance of the statutes involved are  
13 totally different, and the purposes of the statutes are  
14 different, and the conspiracy with respect to the sub-  
15 stantive offenses are not the same, as is pointed out  
16 in the majority opinion.

17 THE COURT: All right. Let's get the jury in.

18 MR. REILLY: Your Honor --

19 THE COURT: You have picked out the places?

20 MR. REILLY: There is a difficulty. I am told  
21 by the reporter that Mr. Eibel and Mr. Cohen differ  
22 concerning what I have selected and what they think  
23 should be selected.

24 THE COURT: Have you selected other places?

25 MR. REILLY: No, they said what I have selected



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2 should not be heard.

3 MR. COHEN: We all started in the same place  
4 but we feel it should be terminated at a certain point,  
5 and Mr. Reilly feels that the additional conversation  
6 should continue.

7 THE COURT: What is the additional conversation  
8 that is subject to dispute? Maybe if it's very short, it  
9 can be read to me and I can make a ruling.

10 MR. COHEN: I think if we can start in, we can  
11 show you exactly where we think it should stop.

12 THE COURT: Let's do that.

13 (Portions of record read.)

14 THE COURT: This question No. 1 on Court's  
15 Exhibit 4, asks for conversations with the defendants,  
16 phone calls and conversations with the defendants regard-  
17 ing the planning of the highjacking.

18 The only calls or conversations with the  
19 defendants had not to do with anything other than the  
20 disposition of the goods, as I remember it. Is there  
21 any proof, any testimony they ever talked about how they  
22 were going to get the truck or anything like that?

23 MR. REILLY: Well, your Honor, it's the  
24 government's theory in this case --

25 THE COURT: I am trying to make sense out of

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2 what the jury has asked for, and the thrust of these  
3 questions was: the jury heard some testimony of conversa-  
4 tions having to do with this overall highjacking between  
5 Crawford and the defendants, and those conversations  
6 really only had to do with getting rid of the load, isn't  
7 that right?

8 MR. EIBEL: Yes.

9 MR. REILLY: Those obviously are the conversations  
10 which the jury has in mind, because those are the only  
11 conversations that the government brought out in its  
12 direct case, concerning conversations before the actual  
13 highjacking.

14 THE COURT: That's what they ask, "Direct  
15 testimony in relation to the phone calls and conversations  
16 with the defendants regarding the planning of the high-  
17 jacking."

18 MR. COHEN: There is the conversation, and I  
19 don't think you got to it: "Did you ever have a conversa-  
20 tion about highjacking a truck with either Cerell or  
21 Viruet?" And the answer was "Yes." That was the plan-  
22 ning. This already goes into the second count. If they  
23 want planning, that's different.

24 MR. EIBEN: There was a conversation before  
25 this, between Crawford and the other three, not Viruet



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2 and Cerell, with regard to highjacking the truck around  
3 Christmas of '72. Then the testimony goes forward: "Did  
4 you have a discussion with these defendants about getting  
5 rid of -- about taking care of the load?" And that is  
6 where it goes on.

7 THE COURT: Well, I disagree with that. I am  
8 going to have this read to the jury, and I will ask them  
9 if this is what they had in mind or if they had something  
10 else in mind.

11 Let me ask you this, Mr. Reilly. I was giving,  
12 in effect, the charge that you gave me on this question  
13 of "intent"; what they had to know about the interstate --  
14 what their intentions were as to an interstate shipment.  
15 Now, in asking me to now give --

16 MR. REILLY: I don't think so, your Honor. I  
17 was quite surprised by your charge, but I thought and  
18 recollected that I had forgotten the Crimmins case, in  
19 bringing that to your attention.

20 MR. EIBEL: Your Honor, I am not going to object  
21 in the presence of the jury. The objection is the one  
22 I made.

23 THE COURT: Am I creating any problems by  
24 changing the thrust of my instructions at this time,  
25 as defendants' counsel contend here?

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2 MR. REILLY: I do not believe so. The fact of  
3 the matter is that if that is the applicable law, it is  
4 the Court's obligation to bring that applicable law to  
5 the attention of the jury. Obviously, this has been a  
6 source of some concern to them in their deliberations,  
7 and it's prolonged for that reason, and I do not believe  
8 there is any prejudice -- obviously there is no prejudice  
9 to the defendant. The only prejudice might be the lesser  
10 standard of proof for the government to bear in obtaining  
11 a conviction on the conspiracy count.

12 THE COURT: It's perfectly clear that nobody  
13 was misled in terms of what trial evidence was obtained.  
14 There is nothing to suggest that.

15 MR. EIBEL: The defendant's position is that  
16 the applicable law is not as is stated by Mr. Reilly.  
17 The applicable law, that's his interpretation; I have a  
18 contrary interpretation.

19 THE COURT: We're past that.

20 MR. EIBEL: I understand that.

21 THE COURT: All right, let's get the jury,  
22 please.

23 MR. COHEN: I, also, at this point, without the  
24 jury being in, take objection and exception to that  
25 portion of the testimony which I claim is not what the



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2 jury wants to hear.

3 MR. EIBEL: In which I join.

4 (Jury present.)

5 (Note from jury marked Court Exhibit 4.)

6 THE COURT: Now, ladies and gentlemen, we have  
7 your note, which I marked Court's Exhibit 4.

8 We are going to have certain direct testimony  
9 of Chester Crawford read to you, which we believe  
10 touches upon that area which you have asked for. All right?

11 Go ahead.

12 (Portions of direct testimony of Chester  
13 Crawford read.)

14 THE COURT: All right.

15 Now, ladies and gentlemen, you have asked  
16 me in Question 2, my charge regarding the interstate  
17 aspect of conspiracy, if I can sum it up in a nutshell.  
18 It has been called to my attention, since I charged you  
19 this morning, that I may have been in error in details of  
20 that charge, and to the extent that I have, I am giving  
21 you now what I understand the law to be in that regard,  
22 and this is the law that you are to apply. If there are  
23 any problems in your understanding of it, please listen  
24 very carefully to what I am about to say to you.

25 With regard to the interstate aspect of this

xxx

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2 conspiracy, it is sufficient -- I assume you have found  
3 all the other elements beyond a reasonable doubt, but  
4 if you have found all the other elements beyond a reason-  
5 able doubt, it is sufficient to satisfy the interstate  
6 commerce aspect of this conspiracy if you find beyond a  
7 reasonable doubt that the truck the conspirators had in  
8 mind to hijack was, in fact, one that would be moving  
9 in interstate commerce.

10 It is not necessary that you find that a  
11 defendant or either of them knew that the truck to be  
12 hijacked would be moving in interstate commerce. It  
13 is sufficient for you to find that the truck to be high-  
14 jacked was, in fact, one that would be going in inter-  
15 state commerce, regardless of what the defendants'  
16 knowledge about the destination of that truck was.

17 Is that what you had in mind to ask me?

18 JUROR NO. 1: One second, please.

19 (At the side bar.)

20 THE COURT: Mr. Reilly, I believe I have  
21 charged the Feola rule now, have I not? Have you any  
22 problems with the Feola rule as I have given it to them?

23 MR. REILLY: No.

24 THE COURT: All right, because this is a  
25 sensitive area and I am having to make a slight change in



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1 the charge, and you have listened to me carefully, I  
2 take it, and this satisfies that requirement.

3 MR. REILLY: I have.

4 THE COURT: I think the jury, if they want to  
5 put a question to me, should do it in writing at this  
6 point, and why don't I give the juror a pad and pencil  
7 and let him write down what it is and hand it to me  
8 even as he sits here? Is there any objection to that?

9 MR. COHEN: As to what?

10 THE COURT: Apparently, Mr. Hoffman has a  
11 question he wants to ask.

12 MR. EIBEL: In court? No objection, your  
13 Honor.

14 THE COURT: I would like him to write it down  
15 and hand it to me.

16 MR. COHEN: Yes.

17 THE COURT: Each of you counsel for the defense  
18 have an exception to the charge?

19 MR. EIBEL: Yes.

20 THE COURT: All right.

21 (In open court.)

22 THE COURT: Mr. Hoffman, I am going to give  
23 you a piece of paper and ask you to write down what it  
24 is you want me to consider. You may sit right here and  
25

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2 do it, but I would rather you put it in writing so that  
3 counsel and we all know exactly what it is.

4 (Pause.)

5 (Note from jury marked Court Exhibit 5.)

6 THE COURT: Now, gentlemen, come to the side  
7 bar so that you may have a look at this.

8 (At the side bar.)

9 THE COURT: The question from the jury is:

10 "What period of time should we consider in  
11 deciding whether there was a conspiracy?"

12 I am going to charge them that while the  
13 indictment charges the conspiracy began on or about  
14 October 15, 1972, and continued thereafter up to October  
15 10, 1975, it is not essential that the government prove  
16 the conspiracy started or ended at specific dates. It is  
17 sufficient that you find, in fact, a conspiracy was  
18 formed and existed for some substantial time within the  
19 period set forth in the indictment, and that the overt  
20 act committed was done at or about the time alleged.

21 (In open court.)

22 THE COURT: Now, ladies and gentlemen, your  
23 question is:

24 "What period of time should we consider in  
25 deciding whether there was a conspiracy?"



The period that you should consider is the period from October 15, 1972, which is the commencement date named in the indictment, up to and including the time of the filing of the indictment, which is October 10, 1975. In that connection, let me give you a little bit of a charge that I gave you at that time:

While the indictment charges that the conspiracy began on or about the 15th of October, 1972, and continued thereafter up to October 10, 1975, it is not essential that the government prove the conspiracy started or ended on or about these specific dates. It is sufficient if you find that, in fact, a conspiracy was formed and existed for some substantial time within the period set forth in the indictment, and that an overt act was committed in furtherance of this objective and was done at or about the time alleged.

Does that respond to the question you put to me?

JUROR NO. 1: Yes, sir.

THE COURT. All right, you may retire and continue your deliberations.

(At 5:10 p.m., the jury retired to continue their deliberations.)

(Recess.)

(In open court; jury present.)

\* \* \*

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**UNITED STATES OF AMERICA,  
Appellee,**

- against -

**FRANK CERELL,  
Appellant.**

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

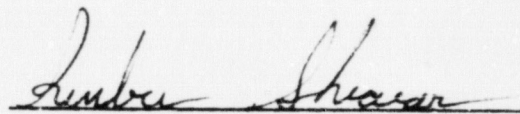
I, Reuben A. Shearer, being duly sworn,  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
211 West 144th Street, New York, New York 10030

That on the **5th** day of **April** 19**76** at **One St. Andrews Plaza, New York**  
deponent served the annexed **Appendix B-1ef** upon

**Robert B. Fiske Jr.,**  
the **Attorney** in this action by delivering a true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the herein,

Sworn to before me, this **5th**  
day of **April** 19 **76**

ROBERT T. BRIN  
NOTARY PUBLIC, State of New York  
No. 31 0418950  
Qualified in New York County  
Commission Expires March 30, 1977

  
Reuben Shearer